

***VICTIMS' PARTICIPATION AND DEFENDANTS' DUE PROCESS RIGHTS:  
COMPATIBLE REGIMES AT THE INTERNATIONAL CRIMINAL COURT***

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While the International Criminal Court (“ICC” or “the Court”) was established to prosecute the perpetrators of the world’s most heinous crimes, its creators also wanted the Court to bring justice to victims. As Fiona McKay of REDRESS stated on behalf of the Victims’ Rights Working Group at the Rome Conference on 16 June 1998, “Punishing criminals is not enough. There will be no justice without justice for victims. And in order to do justice for victims, the ICC must be empowered to address their rights and needs.”<sup>1</sup>

At the same time, the creators of the ICC were also aware that, for the Court to enjoy international legitimacy, it must also respect the rights of defendants. Indeed,

[I]t is precisely at those times when moral outrage is at its highest that the burden on adjudicating bodies is heaviest both to satisfy society’s collective need for condemnation and punishment of war criminals and simultaneously to assiduously protect the rights of those accused of war crimes. In order for a war crimes tribunal to possess legitimacy, it must ensure that rights of the accused are protected by the principles of due process and fundamental fairness.<sup>2</sup>

The balance between the needs of victims and the rights of defendants was recently implicated by a series of submissions to and decisions by Pre-Trial Chamber I (“PTC I”) of the ICC concerning the participation of victims in the situation in the Democratic Republic of Congo (“DRC”). Over the objections of the Office of the Prosecutor (“OTP” or “the Prosecutor”), PTC I held that victims may participate in the pre-trial investigatory stages of situations before the Court. Among other arguments, the OTP alleged that permitting early participation by victims encroaches on the due process rights of named and unnamed defendants.

This article examines the scheme of victims’ participation envisaged for the ICC during the investigative stage, the arguments and issues raised by such participation, and its impact on the Prosecutor’s investigation and the rights of the accused. Section I studies the history of victims’ participation in criminal cases before both domestic and international courts. Section II

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<sup>1</sup> Fiona McKay, Legal Officer, REDRESS, Statement to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome Conference) on behalf of the Victims’ Rights Working Group, 16 June 1998, at <http://www.un.org/icc/speeches/616mck.htm>.

<sup>2</sup> Lynne Miriam Baum, *Pursuing Justice in a Climate of Moral Outrage: An Evaluation of the Rights of the Accused in the Rome Statute of the International Criminal Court*, 19 WIS. INT’L L.J. 197 (2000-2001).

analyzes the parameters set forth for victims' participation in the Rome Statute of the International Criminal Court ("Rome Statute") and Rules of Procedure and Evidence ("RPE"). Section III explains the recent decisions of PTC I concerning the participation of victims. Section IV evaluates the criticisms lodged against these decisions, and the potential impact on defendants' due process rights by the victims' participation regime established by PTC I. Finally, Section V sets forth additional benefits for the Prosecutor that arise by allowing victims' participation to begin at an early stage.

## I. History of Victims' Participation

In domestic courts, permitting victims to participate on their own behalf in criminal cases is not uncommon. Indeed, in the courts of countries that follow the civil law tradition, victims often participate as third parties to the proceedings, and not only as witnesses. For example, in Portugal victims are entitled to "intervene directly in the adversarial investigation proceedings by adducing evidence and requesting the judge to take appropriate measures."<sup>3</sup> A number of other states follow similar procedures, including France,<sup>4</sup> Guatemala,<sup>5</sup> Italy,<sup>6</sup> and The Netherlands.<sup>7</sup> Decisions of the European Court of Human Rights and the Inter-American Court of Human Rights have recognized as legitimate the domestic laws of countries that permit the participation of crime victims during the investigative stage, even before the confirmation of charges.<sup>8</sup>

In the United States, although crime victims cannot participate as third parties in criminal proceedings, a victims' rights movement that began in the 1960s and continues today has

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<sup>3</sup> Legislative Decree No. 35007, art. 4, para. 2, sub-par. 2 (Port.); *recognized in Moreira de Azevedo v. Portugal*, no. 11296/84, para. 52, Eur. Ct. H.R. 1990.

<sup>4</sup> *See discussion in Acquaviva v. France*, no. 19248/91, paras. 35-37, Eur. Ct. H.R. 1995.

<sup>5</sup> Claude Jorda and Jérôme de Hemptinne, *The Status and Role of the Victim*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY*, VOL. II 1387, 1402 (A. Cassese, P. Gaeta and J.R.W.D. Jones eds., 2002). Note that Claude Jorda was the Presiding Judge over PTC I when it rendered the decision to permit victims to participate in the investigation stage of a situation.

<sup>6</sup> *See generally Calvelli and Ciglio v. Italy*, no. 32967/96, Eur. Ct. H.R. 2002.

<sup>7</sup> Jorda and de Hemptinne, *supra* note 5, at 1402.

<sup>8</sup> *The Prosecution's Reply on the Application for Participation 01/04-1/p to 01/04-06/dp*, ICC-01/04-84-Conf, 15 August 2005, paras. 52-53 ("The Prosecution's Reply") ("The Inter-American Court decided that it was clear from the terms of article 8 of the Convention that victims of human rights violations or their relatives are entitled to take steps during criminal proceedings, from the investigation stage and prior to confirmation of the charges . . .", *citing Blake v. Guatemala*, Int-Am. C.H.R., OAS/Ser.L/V/III.43, doc. 11 para. 97 (1998)); *see generally Calvelli and Ciglio v. Italy*, *supra* note 6; *Acquaviva v. France*, *supra* note 4; *Moreira de Azevedo v. Portugal*, *supra* note 3.

positively advanced the role of victims in criminal proceedings.<sup>9</sup> California was one of the first states to enact legislation as a result of this movement, eventually codifying a compensation program for innocent victims of violent crime.<sup>10</sup> Additionally, victims can participate at the sentencing phase of proceedings throughout the United States.<sup>11</sup> At the federal level, several laws have been enacted that promote the rights of victims. For example, the Victims of Crime Act of 1984, which established a Crime Victims' Fund to distribute criminal fines and penalties to victims' compensation and assistance programs, was amended in 2004 to improve notification and enforcement of victims' rights.<sup>12</sup> In addition, the Victims' Rights and Restitution Act of 1990<sup>13</sup> codified the rights of victims to be notified of and be present at all public court proceedings (unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial), and the right to confer with a government attorney in the case. Several constitutional amendments concerning the rights of crime victims have been proposed in Congress and supported by President Bush as recently as 2002, although to date none have been adopted.<sup>14</sup>

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<sup>9</sup> Sue Anna Moss Cellini, *The Proposed Victims' Rights Amendment to the Constitution of the United States: Opening the Door of the Criminal Justice System to the Victim*, 14 ARIZ. J. INT'L & COMP. LAW 839, 852-53 (1997); Dr. Marlene Young and John Stein, *The History of the Crime Victims' Movement in the United States*, April 2005, at <http://www.ojp.usdoj.gov/ovc/ncvrv/2005/pg4c.html>.

<sup>10</sup> CAL. GOV. CODE § 13959-74 (West 1992 & 1997 Electronic update).

<sup>11</sup> Cellini, *supra* note 9, at 853 n.102, citing William T. Pizzi & Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 STAN. J. INT'L L. 37, 62 n.117 (1996).

<sup>12</sup> 42 U.S.C. §§ 10601-03 (West 1984); Justice for All Act of 2004, H.R.5107, Pub. L. No. 108-405:

Section 102. Crime Victims' Rights.

This section amends Title 18 to codify eight statutory rights of crime victims in the Federal judicial system. Among these rights are: the right to be reasonably protected from the accused; the right to be notified of, and not excluded from, public proceedings involving their case; the right to be heard at release, plea, or sentencing; the right to confer with the government attorney; the right to full and timely restitution; the right to be free from unreasonable delays in proceedings; and the right to respect. It requires Federal Government agencies to make their best efforts to ensure that crime victims are given these rights and to advise the victim of any conflict in providing these rights.

Additionally, it allows a victim or the government, after a Federal court denies its request for appropriate relief, to apply for a writ of mandamus to a court of appeals to enforce the rights outlined in this section.

This section does not allow a victim to reopen a plea or sentence or to receive a new trial as relief, and it makes no changes in the law with respect to victims' ability to get restitution.

<sup>13</sup> Victims' Bill of Rights, part of Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4820 (codified in 42 U.S.C. § 10606 (1994)).

<sup>14</sup> Cellini, *supra* note 9, at 868-872; George W. Bush, Address at Robert F. Kennedy Department of Justice, 16 April 2002, at <http://www.whitehouse.gov/news/releases/2002/04/20020416-1.html>.

In the international arena, there is no norm governing victims' participation because the field of international criminal law is still new.<sup>15</sup> However, the international community has long recognized the importance of providing justice for victims. For example, in 1985 the United Nations General Assembly ("UNGA") adopted the Declaration on Basic Principles of Justice for Victims of Crimes and Abuse of Power, which declared that crime victims are entitled to access to judicial mechanisms in order to obtain redress for their injuries.<sup>16</sup> In addition, the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>17</sup> and the American Convention on Human Rights<sup>18</sup> offer the possibility of some form of remedy to injured parties, though neither provides for criminal liability. The European Convention also permits victims to lodge complaints directly with the European Court of Human Rights.<sup>19</sup>

As for practice in existing international criminal tribunals, the *ad hoc* tribunals for Rwanda ("ICTR") and the former Yugoslavia ("ICTY") do not provide as extensively for the participation of victims as the ICC does. At the ICTR and the ICTY, victims can only take part in the criminal proceedings as witnesses called to testify by the Prosecutor<sup>20</sup> and, at least in theory, by the judges or the defense. Moreover, neither tribunal has mechanisms which provide compensation directly to victims for harms suffered.<sup>21</sup>

The less-extensive model of victim participation at the *ad hoc* tribunals is a likely result of the timing and the reasons for their creation. The *ad hoc* tribunals were established by the Security Council to ensure accountability for war crimes and genocide that occurred in specific conflicts after those conflicts had ended. Thus, the personal interests of individual victims were not the Security Council's primary concern.<sup>22</sup> Additionally, the rules of procedure for the *ad hoc*

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<sup>15</sup> Håkan Friman, *Procedural Law of Internationalized Criminal Courts*, in INTERNATIONALIZED CRIMINAL COURTS AND TRIBUNALS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA 317, 350 (C.P.R. Romano, A. Nollkaemper, and J.K. Kleffner, eds., 2004).

<sup>16</sup> GA Res. 40/34, annex, U.N. GAOR, 40th Sess., Supp. No. 53, arts. 5-7, U.N. Doc. A/40/53 (1985).

<sup>17</sup> 4 November 1950, arts. 13, 34, 41, 44, 312 U.N.T.S. 221, E.T.S. 5, as amended by Protocol No. 3, E.T.S. 45, Protocol No. 5, E.T.S. 55, and Protocol No. 8, E.T.S. 118, and Protocol No. 11, E.T.S. 155 (hereinafter "European Convention").

<sup>18</sup> 22 November 1969, arts. 8, 25, 44, 63, 1144 U.N.T.S. 123, 9 I.L.M. 673 (1970).

<sup>19</sup> European Convention, *supra* note 17, at art. 34.

<sup>20</sup> Jorda and de Hemptinne, *supra* note 5, at 1387-88.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 1391.

tribunals were based mostly on the Anglo-American adversarial criminal systems,<sup>23</sup> where victims may only participate as witnesses in criminal trials, and can seek personal redress only through civil law suits.

Nevertheless, the *ad hoc* tribunals helped to focus the progress of international law towards a regime of victims' participation and redress. Indeed, the *ad hoc* tribunals provided the first opportunity for victims to come forward in an international forum. In addition, the statutes creating both tribunals included sections which permitted further recommendations on giving protection, counseling and support to victims and witnesses to be heard by the tribunals.<sup>24</sup> Moreover, although these statutes did not initially provide for reparations to victims, the original Rules of Procedure and Evidence of the both tribunals included provision whereby a victim may bring claims for compensation in domestic courts against individuals found guilty by either tribunal.<sup>25</sup>

## **II. Participation of Victims Under the Rome Statute and Rules of Procedure and Evidence**

Within the context of limited participation by victims at the ICTR and the ICTY, the victims' participation regime established at the ICC shows the positive development of the rights of victims in international criminal law. Where victims were previously regarded in proceedings as witnesses to be called by the prosecution, victims before the ICC "are recognized as an aid to the administration of justice and have a right to express their views and to claim compensation."<sup>26</sup>

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<sup>23</sup> *Id.*

<sup>24</sup> *Rules of Procedure and Evidence*, rule 34, International Criminal Tribunal for the former Yugoslavia, U.N. Doc. IT/32/REV.38 (2006); *Rules of Procedure and Evidence*, rule 34, International Criminal Tribunal for Rwanda, U.N. Doc. ITR/3/REV.1 (1995).

<sup>25</sup> *Rules of Procedure and Evidence*, rule 106, International Criminal Tribunal for the former Yugoslavia, U.N. Doc. IT/32/REV.38 (2006); *Rules of Procedure and Evidence*, rule 106, International Criminal Tribunal for Rwanda, U.N. Doc. ITR/3/REV.1 (1995).

<sup>26</sup> Roy S. Lee, *Introduction: Victims and Witnesses*, in *THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE* 427, 427 (R.S. Lee, ed., 2001); *see* Rome Statute of the International Criminal Court (hereinafter "Rome Statute"), 17 July 1998, art. 68, 37 I.L.M. 999.

## A. The Rome Statute

The Rome Statute discusses the participation of victims only in Article 68(3), which states:

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

The rules governing victims' participation are primarily found outside of the Rome Statute, in the RPE.

## B. The Rules of Procedure and Evidence

The RPE elaborate on the regime of victims' participation set forth in the Rome Statute and provide practical guidance for victims and their legal representatives. In order to participate, a victim must send a written application to the Office of the Registrar.<sup>27</sup> The Office of the Registrar then submits the application to the competent Chamber, which then decides on the arrangements for the victim's participation in the proceedings.<sup>28</sup> The relevant Chamber may reject the application if it does not consider the applicant to be a "victim" within the meaning of the statute, although the applicant may reapply in the future.<sup>29</sup>

Once the relevant Chamber permits his or her participation, a victim may be represented by counsel, who must meet the qualifications set forth for defense counsel.<sup>30</sup> The Chamber may ask that a large group of victims choose a shared legal representative.<sup>31</sup> This is particularly useful because the crimes within the jurisdiction of the Court frequently affect the lives of thousands of victims. In addition, if victims are unable to choose a legal representative, the

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<sup>27</sup> Rules of Procedure and Evidence (hereinafter "RPE"), 9 September 2002, rule 89(1), ICC-ASP/1/3 (part II-A).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* rule 89(2).

<sup>30</sup> *Id.* rule 90.

<sup>31</sup> *Id.* rule 90(2).

Chamber can ask the Registrar to choose one for them.<sup>32</sup> If victims do not have the means to pay for a shared legal representative, they may request financial assistance from the Court to obtain one.<sup>33</sup>

The specifics of when and how a victim or her legal representative may participate are governed by the rulings of the Chamber in which the victim participates.<sup>34</sup> This includes a presumption that a victim's representative will be able to participate in hearings, unless the Court decides that participation should be limited to written observations or submissions.<sup>35</sup>

Additionally, the Chamber may permit a victim to question witnesses at hearings. To do so, the victim's legal representative must make an application to the Chamber for permission to ask questions, and the Chamber can require that the questions be submitted in writing and communicated to the Prosecutor and, if appropriate, the defense.<sup>36</sup> These requirements help to protect the integrity of the Prosecutor's case and the rights of the accused.

The relevant Chamber may also seek the views of victims concerning a broad array of issues, and, where appropriate, may seek the views of victims who have not sought to participate as a party to the proceedings.<sup>37</sup>

### C. Responsibilities of Registrar in Relation to Victims

The Office of the Registrar has a number of responsibilities relating to victims and witnesses.<sup>38</sup> First, the Registrar must provide notice or notification of court proceedings to victims or their legal representatives.<sup>39</sup> The Victims' Participation and Reparations Section of the Registry is responsible for keeping the victims fully informed of the progress of the relevant

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<sup>32</sup> *Id.* rule 90(3).

<sup>33</sup> *Id.* rule 90(5).

<sup>34</sup> *Id.* rule 91(2).

<sup>35</sup> *Id.* rule 91(2); Gilbert Bitti and Håkan Friman, *Participation of Victims in the Proceedings*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 456, 466 (R.S. Lee, ed., 2001).

<sup>36</sup> RPE, *supra* note 27, rule 91(3).

<sup>37</sup> *Id.* rule 93.

<sup>38</sup> *Id.* rule 16.

<sup>39</sup> *Id.* rule 16(a).

Chamber, and for notifying the victims of the proceedings.<sup>40</sup> Second, the Registrar must assist victims “in obtaining legal advice and organizing their legal representation, and providing their legal representatives with adequate support, assistance and information . . . for the purpose of protecting their rights during all stages of the proceedings . . . .”<sup>41</sup> Finally, the Registrar shall assist victims “in participating in the different phases of the proceedings . . . .”<sup>42</sup>

Further, the Registry will coordinate the participation of victims in ICC proceedings. For example, under the Regulations of the Registry, the Registry is to make travel and accommodation arrangements for participating victims,<sup>43</sup> and will provide an allowance for incidentals,<sup>44</sup> attendance,<sup>45</sup> and earnings lost as a result of participation.<sup>46</sup> The Registry can also arrange medical and psychological care for victims while they are at the ICC.<sup>47</sup>

### **III. Recent Developments in PTC I Concerning Victims’ Participation**

PTC I has recently issued a series of decisions which found that victims may participate during the investigative stages of a situation before the Court. The issue of victims’ participation first arose in May 2005 when PTC I received applications from six victims represented by the French non-governmental organization La Fédération Internationale des Droits de l’Homme (“FIDH”),<sup>48</sup> requesting permission to participate in all proceedings concerning the situation in the DRC.<sup>49</sup> In their application forms, each of the applicants requested the ability to participate in the proceedings, “be it at the investigation, trial or sentencing stage.”<sup>50</sup>

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<sup>40</sup> *Id.* rule 92.

<sup>41</sup> *Id.* rule 16(b).

<sup>42</sup> *Id.* rule 16(c).

<sup>43</sup> Regulations of the Registry, 6 March 2006, regs. 81, 82, ICC-BD/03-01-06.

<sup>44</sup> *Id.* reg. 84.

<sup>45</sup> *Id.* reg. 85.

<sup>46</sup> *Id.* regs. 85, 86.

<sup>47</sup> *Id.* reg. 89.

<sup>48</sup> Fédération Internationale des Ligues des Droits de l’Homme, *First Victims Recognised by the International Criminal Court*, 20 January 2006, at [http://www.fidh.org/article.php3?id\\_article=2998](http://www.fidh.org/article.php3?id_article=2998).

<sup>49</sup> *Order regarding Request for Additional Information (concerning applications for participation of victims). Confidential and ex-parte*, 1 June 2005, at [http://www.icc-cpi.int/library/cases/20050526ordonnanceRDC\\_En.pdf](http://www.icc-cpi.int/library/cases/20050526ordonnanceRDC_En.pdf).

<sup>50</sup> Application No. ICC-01/04-25-Conf-Exp-tEN, p. 3; Application No. ICC-01/04-26-Conf-Exp-tEN, p. 3; Application No. ICC-01/04-27-Conf-Exp-tEN, p. 3; Application No. ICC-01/04-28-Conf-Exp-tEN, p. 3; Application No. ICC-01/04-29-Conf-Exp-tEN, p. 3; Application No. ICC-01/04-30-Conf-Exp-tEN, p. 3.

Although the OTP was supportive of victims' participation once a case has been brought against an individual, it objected to giving victims the ability to participate in the investigative stages of situations when no defendants have been named. Some of these arguments were based on the text of the Rome Statute,<sup>51</sup> while others concerned the practicality of permitting victims' participation. The OTP also argued that the due process rights of defendants could be damaged by permitting victims to participate at such an early stage.<sup>52</sup>

On 17 January 2006, PTC I ruled that each individual requesting permission to participate qualified as a "victim" within the meaning of the Rome Statute, and found that each had the right to participate in all stages of the progress of the situation, including the investigation stage.<sup>53</sup> The decision responded to arguments made by the Prosecutor against permitting the victims to participate during investigations. In particular, it found the participation of victims at the investigative stage would not jeopardize the integrity or objectivity of investigations. The Chamber reasoned that allowing victims to participate during an investigation "does not entail giving access to the 'record of the investigation' nor does it affect the Prosecutor's capacity to conduct the investigation in conformity with the requirements of the Statute . . . ."<sup>54</sup> In addition, the Chamber found that "it is the extent of the victims' participation, and not his or her participation as such"<sup>55</sup> that is relevant when determining the possible adverse impact of that participation.

PTC I also noted in its decision that permitting victims' participation during the investigation is consistent with the object and purpose of the victims' participation regime established in the Rome Statute, "which ensued from a debate that took place in the context of the growing emphasis placed on the role of victims by the international body of human rights law and by international humanitarian law."<sup>56</sup>

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<sup>51</sup> For example, the OTP argued that victims were only allowed to participate when there are "proceedings" within the meaning of article 68(3) of the statute, and that no such proceedings exist while a situation was merely being investigated. The Prosecution's Reply, *supra* note 8, at para. 13.

<sup>52</sup> See Section IV.

<sup>53</sup> *Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6*, ICC-01/04-101-tEN-Corr, 17 January 2006, para. 54, (hereinafter "Decision on the Applications of VPRS 1-6").

<sup>54</sup> *Id.* at para. 59.

<sup>55</sup> *Id.* at para. 58.

<sup>56</sup> *Id.* at para. 50.

On 23 January 2006 the OTP filed leave to appeal PTC I's decision to permit the victims to participate in the investigative stage of the situations before the ICC.<sup>57</sup> The OTP argued that PTC I's decision

potentially allows any person who claims to have suffered prejudice as a result of an international criminal act in the DRC since 1 July 2002 to participate in investigative proceedings, regardless of whether the person demonstrates any connection to the actual focus of the investigation at the time, or any future case.<sup>58</sup>

The OTP also reiterated its argument that allowing victims to participate would endanger the integrity and objectivity of investigations, thereby opening the door to future allegations that the inquiry was subject to undue influence and bias.<sup>59</sup> It argued that the decision does not provide for any safeguards to prevent the process of participation from being abused with the aim to obstruct or impede the investigation and prosecution of crimes within the jurisdiction of the Court.<sup>60</sup> Additionally, the OTP argued that permitting early participation would expose the identity of victims and witnesses, thereby affecting their safety, well-being and privacy.<sup>61</sup> Finally, the OTP argued that the broad scope of victims' participation envisioned in PTC I's decision creates an imbalance between victims and any future accused persons.<sup>62</sup>

On 27 January 2006, FIDH filed its observations following the Prosecutor's application for leave to appeal.<sup>63</sup> FIDH argued that "the Prosecutor's Application systematically fails to take into consideration the many provisions of the Statute and the Rules of Procedure and Evidence which provide for and organize the participation of victims."<sup>64</sup> FIDH also argued that

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<sup>57</sup> *Prosecution's Application for Leave to Appeal Pre-Trial Chamber I's Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6*, ICC-01/04-103, 23 January 2006 (hereinafter "Prosecution's Application to Appeal").

<sup>58</sup> *Id.* at para. 5.

<sup>59</sup> *Id.* at para. 13.

<sup>60</sup> *Id.* at para. 18.

<sup>61</sup> *Id.* at para. 13.

<sup>62</sup> *Id.* at para. 13.

<sup>63</sup> *Observations of the Legal Representatives of VPRS 1 to VPRS 6 following the Prosecutor's Application for Leave to Appeal Pre-Trial Chamber's Decision on the Applications for Participation in Proceedings of VPRS 1 to VPRS 6* ICC-01/04-105, 27 January 2006, (hereinafter "Observations of the Legal Representatives").

<sup>64</sup> *Id.* at para. 7.

victims' participation is part of the concept of a fair trial . . . . [T]aking their interests into account constitutes one of the factors contributing to the balance which is all the more essential since the proceedings concern the violation of their fundamental rights and since the reparation for the harm suffered depends directly on the outcome of the criminal trials.<sup>65</sup>

On 30 January 2006, the OTP filed a request for leave to reply to FIDH.<sup>66</sup> PTC I granted the OTP leave to reply on 1 February 2006.<sup>67</sup> On 6 February 2006 the OTP filed its reply.<sup>68</sup>

On 31 March 2006, PTC I denied the OTP's request for leave to appeal.<sup>69</sup> PTC I stated that its decision to permit the victims to participate during the investigation would not adversely impact the proceedings. It noted that "the system of participation can only enhance the impartiality of the Prosecutor's investigation in that it will afford him access to additional evidence."<sup>70</sup>

On 25 April 2006, the OTP sought leave to appeal from the Appeals Chamber.<sup>71</sup> The OTP asked the Appeals Chamber to either: (1) overturn PTC I's decision and grant the appeal; (2) overturn PTC I's decision and ask PTC I to grant leave to appeal; or (3) overturn PTC I's decision and make its own ruling on the matter.<sup>72</sup>

On 13 July 2006, the Appeals Chamber denied the Prosecutor's request for review of PTC I's decision concerning the participation of victims, on the grounds that the Rome Statute does not provide the Prosecutor with the right to appeal the Pre-Trial Chamber's denial of leave

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<sup>65</sup> *Id.* at para. 18, quoting ICC-01/04-31-Conf-Exp-tEN, paras. 20-22.

<sup>66</sup> *Prosecution's Application for Leave to Reply to "Observations of the Legal Representatives of VPRS 1 to VPRS 6 following the Prosecutor's Application for Leave to Appeal Pre-Trial Chamber's Decision on the Applications for Participation in Proceedings of VPRS 1 to VPRS 6*, ICC-01-04-107, 30 January 2006.

<sup>67</sup> *Decision on the Prosecution's Application for Leave to Reply*, ICC-01/04-110, 1 February 2006.

<sup>68</sup> *Prosecution's Reply to "Observations of the Legal Representatives of VPRS 1 to VPRS 6 following the Prosecutor's Application for Leave to Appeal Pre-Trial Chamber's Decision on the Applications for Participation in Proceedings of VPRS 1 to VPRS 6"*, ICC-01/04-111, 6 February 2006.

<sup>69</sup> *Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006, on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6*, ICC-01/04-135, 31 March 2006.

<sup>70</sup> *Id.* at para. 45.

<sup>71</sup> *Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal*, ICC-01/04-141, 25 April 2006.

<sup>72</sup> *Id.* at para. 77.

to appeal.<sup>73</sup> The Appeals Chamber’s decision effectively settled the issue of victims’ participation at the investigative phase of a situation, at least regarding the DRC situation.

#### **IV. Analysis of Arguments Against Allowing Victims to Participate In the Investigative Stages of Cases Before the ICC**

As set forth above, the OTP made a number of different arguments opposing the participation of victims during the investigative stages of situations. Because skepticism about the ICC’s protection of the rights of accused persons can directly affect the international community’s perception of the ICC as a legitimate criminal penal institution, this section of the paper analyzes the OTP’s concerns about the impact of victims’ participation on defendant’s rights. It finds that the participation of victims will be neither prejudicial to nor inconsistent with the fair and impartial trial that the Rome Statute demands for defendants.

##### **A. Due Process Rights of Defendants Before the Court**

As Monroe Leigh, former legal adviser to both the United States Department of State and Department of Defense, and former president of the American Bar Association and the American Society for International Law, has stated, “the list of due-process rights guaranteed by the Rome Statute is . . . somewhat more detailed and comprehensive than those in the American Bill of Rights . . . .”<sup>74</sup> Because the inclusion of these due process rights was self-evident to those who created the ICC, most of the provisions for the due process rights of defendants are set forth in the Rome Statute, and not in the later-written RPE.

Article 55(1) of the Rome Statute sets forth rights granted to anyone during an investigation, including witnesses. These include: the right not be compelled to incriminate oneself or to confess guilt<sup>75</sup> (comparable to the United States’ Fifth Amendment right not to incriminate oneself); the right not to be subjected to any form of coercion, duress or threat, or to

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<sup>73</sup> *Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal*, ICC-01/04-168, 13 July 2006.

<sup>74</sup> Monroe Leigh, *The United States and the Statute of Rome*, 95 AM. J. INT’L L. 124, 130-131 (2001).

<sup>75</sup> Rome Statute, *supra* note 26, art. 55(1)(a).

torture or to any other form of cruel, inhuman or degrading treatment or punishment<sup>76</sup> (comparable to the United States' Eighth Amendment right against cruel and unusual punishment); the right to have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness<sup>77</sup> (all U.S. states and federal circuits provide defendants with interpreters free of charge, but the issue of whether this right is guaranteed in the U.S. Constitution remains unsettled<sup>78</sup>); and the right not to be subjected to arbitrary arrest or detention, or to be deprived of liberty without due process<sup>79</sup> (comparable to the United States' Fifth Amendment due process rights).

Article 55(2) of the Rome Statute sets forth an additional set of rights for those who are believed to have committed crimes within the jurisdiction of the court when they are about to be questioned. These include: the right to be informed, prior to questioning, that there are grounds to believe that he has committed a crime within the jurisdiction of the Court;<sup>80</sup> the right to remain silent, without such silence being a consideration in the determination of guilt or innocence<sup>81</sup> (comparable to the United States Fifth Amendment right not to incriminate oneself); the right to have legal assistance of one's choosing, or to have legal assistance provided, free of charge, where one cannot afford it<sup>82</sup> (comparable to the United States Sixth Amendment right to counsel); and the right to be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel<sup>83</sup> (comparable to *Miranda* rights in the United States).

A further set of rights applies when an individual is tried as a defendant before the Court. Under Article 66 of the Rome Statute, the defendant is presumed innocent until proven guilty, and the Prosecutor bears the burden to prove the defendant's guilt beyond a reasonable doubt (comparable to the United States Supreme Court's requirement that prosecutors must prove

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<sup>76</sup> *Id.* art. 55(1)(b).

<sup>77</sup> *Id.* art. 55(1)(c).

<sup>78</sup> *See, e.g., United States v. Johnson*, 248 F.3d 655, 663 (7th Cir. 2001).

<sup>79</sup> Rome Statute, *supra* note 26, art. 55(1)(d).

<sup>80</sup> *Id.* art. 55(2)(a).

<sup>81</sup> *Id.* art. 55(2)(b).

<sup>82</sup> *Id.* art. 55(2)(c).

<sup>83</sup> *Id.* art. 55(2)(d).

defendants' guilt beyond a reasonable doubt in all criminal cases<sup>84</sup>). In addition, under Article 67 of the Rome Statute, the defendant has the right, but not the obligation, to put on a defense case<sup>85</sup> and to examine witnesses against him or her<sup>86</sup> (comparable to the defendant's United States Sixth Amendment right to confront the witnesses against him).

## B. Preservation of Defendants' Due Process Rights

Most of the due process rights of defendants enumerated above are not affected by the timing of the participation of victims. For example, regardless of when victims participate, defendants retain the unencumbered right to have counsel present when they are questioned, to request an interpreter when necessary, and to have the Prosecutor prove their guilt beyond a reasonable doubt. Although some of the defendants' due process rights are implicated by permitting victims to participate during the investigative stage of a situation, these rights are not impaired by the prospect of such participation.

### 1. Presumption of Innocence

In order to allow a victim to participate, the Pre-Trial Chamber must make an early determination that there are "grounds to believe" that crimes within the jurisdiction of the Court have been committed, and that the petitioning individual is in fact a victim of these crimes.<sup>87</sup> The OTP has argued that, in making this determination, PTC I engaged in inquiry and fact-finding activities not provided for in the Statute, capable of giving rise to allegations of prejudice.<sup>88</sup>

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<sup>84</sup> *In re Winship*, 397 U.S. 358, 364 (1970). For a discussion of the evolution of this standard of proof in the United States, see Erik Lillquist, *Absolute Certainty and the Death Penalty*, 42 AM. CRIM. L. REV. 45 (2005).

<sup>85</sup> Rome Statute, *supra* note 26, art. 67(1)(d).

<sup>86</sup> *Id.* art. 67(1)(e).

<sup>87</sup> Decision on the Applications for Participation of VPRS 1-6, *supra* note 53, at paras. 77-99.

<sup>88</sup> Prosecution's Application to Appeal, *supra* note 57, at para. 22. The defense for Thomas Lubanga Dyilo has also argued that permitting victims' participation in the period leading up to the Confirmation of Charges hearing infringes on the presumption of innocence, and would delay and complicate the proceedings. See *Request for Leave to Appeal the "Décision sur les demandes de participation à la procédure présentées par les Demandeurs VPRS 1 à VPRS 6 dans l'affaire Le Procureur c. Thomas Lubanga Dyilo et de l'enquête en République démocratique du Congo"*, ICC-01-04-01-06-272, 7 August 2006, paras. 10, 48-62; *Defence Observations Relative to the Proceedings and Manner of Participation of Victims a/0001/06 to a/0003/06*, ICC-01/04-01/06-379, 4 September 2006, paras. 22-26.

However, allowing early participation by victims will not undermine the presumption of innocence, for several reasons. First, while the OTP correctly stated that PTC I decided whether a crime occurred, PTC I decided nothing more; PTC I did not single out a perpetrator who committed that crime. Provided that the Pre-Trial Chamber maintains this practice of recognizing victims during the pre-trial stage, individual defendants will continue to be presumed innocent when they come before the Court.

Second, even if a Pre-Trial Chamber must single out an accused person in order to determine that a victim has suffered injury within the jurisdiction of the Court, the Pre-Trial Chamber will not make the final determination as to that accused person's guilt or innocence. Rather, the Trial Chamber will make that decision at a later date. Indeed, permitting the Pre-Trial Chamber to determine whether victims can participate helps to preserve the integrity of the trial proceedings because the Trial Chamber may not have to perform any initial "fact-finding" with respect to previously-recognized victims.

Finally, regardless of any decisions made by the Pre-Trial Chamber about victims' participation, the Prosecutor still bears the burden at trial of proving each defendant guilty of specific crimes beyond a reasonable doubt. Thus, the presumption of innocence is undisturbed by early victim participation.

## 2. Fair and Public Hearing by a Competent, Independent, and Impartial Tribunal

The OTP has also argued that permitting victims to participate during the pre-trial phase will affect the fairness of pre-trial proceedings because these external elements could damage integrity of the investigation.<sup>89</sup> The OTP makes several points in support of this argument. First, the OTP argues that permitting victims to participate during investigatory stages opens the door for victims to present unregulated evidence directly to the Pre-Trial Chamber.<sup>90</sup> The OTP claims that this is problematic because, while Article 54 of the Rome Statute sets forth a standard that evidence presented by the OTP must meet, there is no standard that evidence presented by

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<sup>89</sup> *Id.* at para. 13.

<sup>90</sup> *Id.* at para. 16.

victims must meet before the Court may consider it. The OTP noted that this was particularly problematic because the Pre-Trial Chambers of the ICC lack investigative tools to assess the reliability of information from third parties.<sup>91</sup>

This argument, while presenting valid concerns, is unpersuasive for several reasons. First, it disregards the fact that the judges of the Pre-Trial Chamber are required to take into account the source of information when they are evaluating it. As set forth in Article 69 of the Rome Statute and Chapter 4(I) of the RPE, the Pre-Trial Chamber would give more weight to evidence provided by the Prosecutor because it must meet a higher standard of reliability.

More importantly, the OTP's argument does not take into account that, regardless of the source of any evidence in a case, the distinct standards of proof necessary to begin a criminal prosecution and the standards of proof necessary for conviction at trial remain the same. First, in order to initiate a criminal prosecution, the OTP must prove that there is "sufficient evidence to establish substantial grounds to believe that the person committed the crime charged."<sup>92</sup> Second, for a Trial Chamber to convict an accused, the OTP must prove his or her guilt beyond a reasonable doubt.<sup>93</sup> Thus, the evidence presented must always be credible enough and comprehensive enough to both charge and convict an accused person. Furthermore, although information may be admitted at the investigative stage before the Pre-Trial Chamber, the Trial Chamber will make the final determination as to a defendant's guilt. Any information found to be incredible or unreliable during the investigation would be excluded by the Trial Chamber when it determines the guilt or innocence of the accused.

The OTP's second concern with the integrity of investigations is that PTC I's decision does not provide any safeguards that prevent the process of participation from being abused by

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<sup>91</sup> *Id.* "Pre-Trial Chambers of this Court are not investigative chambers. They were not intended to perform investigative functions beyond their specific instances of intervention at the investigation stage, and accordingly they are not equipped with the necessary tools and resources to efficiently gather and analyse material as it is required in inquiry activities, including determining the reliability of sources. Consequently, by engaging in inquiry and fact-finding activities such as those contemplated in the Decision, the Chamber may not only be reaching premature and inappropriate factual conclusions, but also doing so on the basis of information the reliability of which it can only test in an extremely limited fashion." *Id.* at para. 27.

<sup>92</sup> Rome Statute, *supra* note 26, art. 61(5).

<sup>93</sup> *Id.* art. 66(3).

those who wish to impede or obstruct an investigation before the Court. While this concern should be noted by any Chamber faced with requests by victims to participate, it should also be made clear that the Pre-Trial Chamber is not required to permit the participation of all individuals who claim to be victims and seek the right to participate. Rather, the Pre-Trial Chamber closely evaluates whether each applicant is entitled to participate.<sup>94</sup>

Moreover, permission by a Pre-Trial Chamber to participate in proceedings before the Court does not grant unbridled access to an investigation. Rather, as the decisions of PTC I have made clear, the scope of each victim's participation will be specifically carved out by the relevant Chamber.<sup>95</sup> The Pre-Trial Chamber may limit participation as necessary, thereby protecting the investigation from those who would impede it.

### 3. Equality of Arms

The OTP also argued against PTC I's decision to permit victims to participate during investigations on the grounds that it creates an imbalance between victims and defendants, both named and unnamed.<sup>96</sup> The OTP expressed concern that, because victims can participate before defendants are even identified, "the Decision . . . vests the victims with a range of procedural rights that no person under investigation enjoys . . . ."<sup>97</sup> The OTP noted that, although PTC I had appointed *ad hoc* counsel to represent future defendants during the investigative stages, having *ad hoc* counsel is only sufficient for confined and specific procedures, and may not protect the defendant's rights during the entire investigative stage.<sup>98</sup>

The OTP's concerns about equality of arms are overstated. First, the inclusion of victims during the investigation of a situation does not create an imbalance between the actual parties to future cases. Unlike those domestic judicial systems in which participating victims actually become third parties to the case, victims before the ICC do not gain the status of fully

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<sup>94</sup> See section (IV)(B)(4).

<sup>95</sup> Decision on the Applications of VPRS 1-6, *supra* note 53, at paras. 57-60; *Décision autorisant le dépôt d'observations sur les demandes de participation à la procédure a/0004/06 à a/0009/06, a/0016/06 à a/0063/06 et a/0071/06*, ICC-01/04-228, 22 September 2006.

<sup>96</sup> Prosecution's Application to Appeal, *supra* note 57, at para. 13.

<sup>97</sup> *Id.* at para. 21.

<sup>98</sup> *Id.* at para. 22.

participating third parties at any phase of the investigation or proceedings. Therefore, inclusion of the victims during the pre-trial phase does not disrupt the balance of arms between the two parties to the potential future trial – the Prosecutor and the defendant. Although permitting victims to offer input at an early stage may actually bolster the Prosecutor’s case, this does not, in itself, create an imbalance. As the OTP has suggested, much of the information provided by victims on their own behalf will duplicate that which the Prosecutor puts forth.<sup>99</sup>

In addition, although the victims may begin to participate before defendants have even been named, future defendants are protected because *ad hoc* counsel can and should be appointed by the Pre-Trial Chamber in order to ensure that defendants are represented during any stage that would involve victims. Therefore, potential defendants are not without legal representations and protection. Moreover, once a defendant is identified, he can choose his own counsel, and that counsel will have access to all materials previously available to the *ad hoc* counsel. Thus, a named defendant will still have adequate time and facilities to prepare his defense.

Furthermore, PTC I has demonstrated that, although victims may be granted the right to participate, it will strictly administer the scope of that participation. For example, in September 2006 PTC I set forth the arrangements by which the victims’ legal representatives would participate in the confirmation of charges hearing in the case against Thomas Lubanga Dyilo.<sup>100</sup> However, PTC I limited the scope of their participation. Because it found the preservation of the victims’ anonymity to be a high priority, PTC I restricted participation by the victims to actions which can be taken anonymously.<sup>101</sup> PTC I also found that it would be improper for anonymous parties to make accusations against the accused, and therefore it limited the participation of victims such that they were not permitted to add any factual elements to the case.<sup>102</sup> Therefore, PTC I found that the victims may only have access to public documents in the case file, and be

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<sup>99</sup> *Id.* at para. 16.

<sup>100</sup> *Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing*, ICC-01/04-01/06-462-tEN, 22 September 2006.

<sup>101</sup> *Id.* at p. 6.

<sup>102</sup> *Id.* at pp. 7-8.

present at public hearings.<sup>103</sup> Such limited access does not create an inequality of arms, particularly when this access was already available to *ad hoc* counsel for the defense.

#### 4. Right to be Tried Without Undue Delay

The OTP also argued against the participation of victims during investigations on the grounds that the sheer number of potential victims would dramatically slow pre-trial procedures. It argued that PTC I's decision

potentially allows any person who claims to have suffered prejudice as a result of an international criminal act in the DRC since 1 July 2002 to participate in investigative proceedings, regardless of whether the person demonstrates any connection to the actual focus of the investigation at the time, or any future care.<sup>104</sup>

However, the drafters of the Rome Statute and the RPE foresaw this potential problem, and created mechanisms to address it. Indeed, “[i]t was considered absolutely necessary to devise a realistic system that would give satisfaction to those who had suffered harm without jeopardizing the ability of the Court to proceed against those who had committed the crimes.”<sup>105</sup>

Most significantly, the Pre-Trial Chamber will not permit all applicants to participate in situations and cases as victims. First, PTC I established four criteria which applicants must meet in order to be recognized as victims who may participate before the Court with respect to a specific situation: (i) whether the applicants are natural persons; (ii) whether the applicants have suffered harm; (iii) whether the crimes alleged by the applicants fall within the jurisdiction of the Court; and (iv) whether there is a causal link between these crimes and the harm suffered by the applicants.<sup>106</sup>

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<sup>103</sup> *Id.*

<sup>104</sup> Prosecution's Application to Appeal, *supra* note 57, at paras. 5, 29-36.

<sup>105</sup> Silvia A. Fernández de Gurmendi, *Victims and Witnesses: Definition of Victims and General Principle*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 427, 429 (R.S. Lee, ed., 2001).

<sup>106</sup> Decision on the Applications of VPRS 1-6, *supra* note 53, at para. 79.

Second, PTC I has demonstrated that the Chambers will critically evaluate whether petitioning parties may participate in situations and cases. On 5 May 2006, the six victims already recognized by PTC I sought permission from PTC I to participate in the specific case against Thomas Lubanga Dyilo. PTC I denied all of the applications, finding that they had not proven a causal link between their injuries and the crimes included in the arrest warrant against Mr. Lubanga.<sup>107</sup>

As of October 27, 2006, approximately 105 individuals had applied to participate as victims before PTC I concerning the situation in the DRC and in the case against Lubanga.<sup>108</sup> After the Court provided complete copies of all applications to the OTP and redacted copies to *ad hoc* counsel for the defense, each side submitted comments and concerns in response to the applications.<sup>109</sup> PTC I denied over 60 applicants the status of victim in the Lubanga case, finding that they had not established a sufficient link between the harms suffered and the charges against Lubanga.<sup>110</sup> In response to this set of applications, PTC I granted only one applicant the right to participate.<sup>111</sup>

These recent decisions demonstrate that the Pre-Trial Chamber, and in the future the Trial Chamber, will exercise appropriate discretion in determining whether victims can participate in all situations and cases by carefully evaluating whether there is a causal connection between a putative victim and an accused person. Moreover, even if victims are granted the right to participate in the investigation of a situation, they will not necessarily be permitted to participate in a case arising out of that situation. Thus, these decisions should assuage fears that participation by unlimited numbers of victims will drastically slow the progress of cases.

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<sup>107</sup> *Décision sur les demandes de participation à la procédure présentées par les Demandeurs VPRS 1 à VPRS 6 dans l'affaire Le Procureur c. Thomas Lubanga Dyilo*, ICC-01/04-01/06-172, 29 June 2006.

<sup>108</sup> Victims' Rights Working Group, *ICC Victims' Rights Legal Update* (hereinafter "VRWG Legal Update"), 26 October 2006, at [http://www.vrwg.org/Publications/01/2006\\_OctLegalUpdate.pdf](http://www.vrwg.org/Publications/01/2006_OctLegalUpdate.pdf).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*; *Décision sur les demandes de participation à la procédure a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06 dans le cadre de l'affaire le Procureur c. Thomas Lubanga Dyilo*, ICC-01/04-01/06-601, 20 October 2006, (hereinafter "20 October 2006 Décision").

<sup>111</sup> VRWG Legal Updates, *supra* note 108; 20 October 2006 Décision, *supra* note 110.

Furthermore, the scope of victims' participation during the pre-trial proceedings is not boundless. Rather, the extent of victims' participation is left to the relevant Chamber to delineate.<sup>112</sup> Therefore, should it appear that participation of numerous victims may endanger the due process rights of defendants, the Chamber may enforce rules necessary to prevent this from happening. The recent decisions of PTC I, which allow very limited participation of several victims in the Lubanga case, indicate that the scope of victims' participation will likely be narrow in future proceedings.<sup>113</sup>

Finally, Chapter 4(III)(4) of the RPE contains provisions requiring victims to act through a common legal representative. Rather than allowing each victim to participate individually, the RPE envision a system somewhat similar to class action suits in the United States, where groups of victims are represented by a common legal representative.<sup>114</sup> In theory, victims before the ICC could be divided into classes who share a common legal representative, on the basis of the harm suffered, region, alleged crimes, and other factors.

## **V. Benefits to the Prosecutor of Allowing Early Victims' Participation**

Though the Prosecutor has argued extensively against victims' participation in the early stages of a situation before the Court, the Prosecutor may stand to benefit from their early participation.

First, the Prosecutor benefits because early participation by victims will contribute new evidence that may help the Prosecutor understand the nature and scope of crimes committed in a particular region. The nature of the crimes before the Court creates a number of investigative difficulties for the Prosecutor that are often absent in domestic cases. For example, these crimes are often committed over vast territories and involve hundreds of perpetrators. In addition, investigations will often be conducted amidst an ongoing conflict, or a considerable time after

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<sup>112</sup> *Id.* at 457.

<sup>113</sup> *See* section (IV)(B)(3).

<sup>114</sup> Bitti and Friman, *supra* note 35, at 462.

the alleged crimes occurred.<sup>115</sup> Furthermore, because of the nature of the crimes within the Court's jurisdiction, investigations often cannot simply focus on facts, but also entail the need to clarify the political background and the historical developments which led to the alleged atrocities in a certain region.<sup>116</sup>

Enabling victims to participate at early stages will help the Prosecutor overcome these obstacles<sup>117</sup> because the victims can present evidence about when, where, and how the alleged crimes have been or are being committed. This information will clarify the nature of the crimes committed, and may present new leads for the OTP. Also, having information from as many sources as possible will clarify the scope of the crimes committed, as well as the common scheme or plan connecting these crimes. All of this information will help identify the architects of the crimes, the individuals that the ICC was designed to prosecute.

The OTP also benefits from early participation by victims because permitting the victims to represent their own needs and concerns will relieve the Prosecutor from having to fill this role. Indeed, “[a]lthough the victim is not formally a party to the proceedings, he now enjoys the right to be heard at all important stages of the prosecution process, and in particular the fundamental right to be legally represented by a lawyer of his own choosing.”<sup>118</sup> With the responsibility for representing the victims eased, the Prosecutor can devote all his efforts to completing prosecutions and the protection of international public order.<sup>119</sup> This is especially important because the work of the Prosecutor to seek convictions and establish international accountability does not always correspond with the needs of victims.<sup>120</sup>

Permitting victims to participate early in the proceedings will also have practical benefits for the Prosecutor at trial. Whether domestic or international, a criminal trial is more successful when the prosecutor is aware of all facts in the case, including all evidence a victim might present at trial. By permitting victims to participate during investigative stages, the OTP will be

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<sup>115</sup> Salvatore Zappalà, *Rights of Persons During An Investigation*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, VOL. II 1181, 1182 (A. Cassese, P. Gaeta and J.R.W.D. Jones eds., 2002).

<sup>116</sup> *Id.* at 1181.

<sup>117</sup> Jorda and de Hemptinne, *supra* note 5, at 1389.

<sup>118</sup> *Id.* at 1395, 1408.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 1388.

made aware of information that pre-trial victims could introduce at trial, thereby preventing the revelation of new information at trial from having detrimental effects on the case.

Permitting participation by victims at an early stage also lends credibility to the Prosecutor's work because it creates another mechanism by which the discretionary power of the Prosecutor is checked.<sup>121</sup> Although the OTP will attempt to investigate crimes within its jurisdiction as thoroughly as possible, the OTP may inadvertently fail to investigate an aspect of a crime, such as a particular individual or region. Because victims can represent their own interests, they can monitor the proceedings and make their voice heard if the Prosecutor appears to be overlooking part of the situation. While the OTP retains final discretion over which individuals to charge with what crimes, the victims' voice can

guarantee fairness and justice . . . because persons whose most fundamental rights have been flouted would thus have not only the certainty of being heard but also the formal assurance that, if it were decided to take no action on their case, the reasons for such decision would be based on overriding public-interest considerations and not on purely political grounds.<sup>122</sup>

Moreover, "legal certainty would be guaranteed, because the Prosecutor would be legally bound to examine all complaints submitted to him and to justify his refusal to act on them . . ." <sup>123</sup>

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Not only will the Prosecutor benefit from permitting early victims' participation, but the victims will benefit from having their voice heard and from helping to ensure that all cases are properly investigated and defendants pursued. In addition, victims benefit from being able to participate on their own motion at early stages because victims can only take advantage of the safety and security protections of the Court once they are before the Court as a witness for the OTP or as a participating victim. Although the OTP expressed concerns that permitting victims to participate would lead to exposure of victims and witnesses, it in fact gives victims access to

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<sup>121</sup> *Id.* at 1394.

<sup>122</sup> *Id.* at 1394-95.

<sup>123</sup> *Id.* at 1395.

the protection afforded by the Court when they seek it, rather than when the prosecutor decides to call them to testify. Indeed, FIDH noted that danger to victims does not come from their mere request to participate, but occurs “when they have not yet been authorized to participate, as only such authorization may entitle them to the potential enjoyment of the protection system provided by the Court.”<sup>124</sup>

By granting victims this protection when they seek it, the Court gives victims incentive to come forward. This incentive will hopefully lead victims who might otherwise be reluctant to come forward to present their stories to the Court, perhaps earlier than they might otherwise have done. It is these victims, participating as witnesses for the OTP or on their own behalf, who enable the Court to completely investigate and prosecute the perpetrators of war crimes, genocide, and crimes against humanity. The success of the Court is dependent on victims, regardless of the efforts of the OTP and the Chambers of the ICC, because no case can go forward without witnesses who are willing to tell their story. The regime of victims’ participation established by the Rome Statute, the RPE, and the decisions of PTC I signal the creation of a new international norm in which victims can participate at all stages of ICC proceedings to make their voices heard and to begin to redress of wrongs they have suffered.

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<sup>124</sup> Observations of the Legal Representatives, *supra* note 63, at para. 27.